

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP701

Cir. Ct. No. 2005CF284

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN F. ZASTROW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Steven Zastrow, pro se, appeals an order denying his postconviction motion to withdraw his no contest plea. Zastrow argues he should be permitted to withdraw his plea because the criminal complaint that

provided a factual basis for his plea did not establish jurisdiction or venue in Wisconsin. He also contends he should be permitted to withdraw his plea because his trial counsel was ineffective for failing to challenge jurisdiction and venue. We reject Zastrow's arguments and affirm.

BACKGROUND

¶2 On May 3, 2005, the State charged Zastrow with theft of a firearm, possession of a firearm by a felon, theft of moveable property valued at more than \$10,000 as party to a crime, and felony bail jumping. Relevant to this appeal, the complaint alleged Zastrow committed the crime of theft of movable property because he, "as party to a crime, did intentionally retain possession of movable property of Riesterer & Schnell having a value greater than \$10,000, without consent, and with intent to permanently deprive the owner of possession of the property."

¶3 In support of that charge, the complaint first stated that in August 2003, Riesterer & Schnell Inc., located in Outagamie County, Wisconsin, reported that someone stole four pieces of tractor equipment valued at a total of \$34,195. Riesterer & Schnell's manager told an Outagamie County sheriff's deputy that no one had permission to take its tractor equipment.

¶4 The complaint then alleged that Zastrow had fled from Wisconsin to Texas while released on bond for an unrelated Wisconsin felony. When Zastrow was located in Texas, Texas police discovered, based on serial number tracing, Riesterer & Schnell's tractor equipment in Zastrow's possession. When Zastrow was returned to Wisconsin, Zastrow admitted to a sheriff's deputy that he knew the tractor equipment was stolen. He also told the deputy that he did not directly take the equipment, but picked it up in Iowa from a friend. The complaint further

alleged that, in 2001, Zastrow and another co-defendant either stole or attempted to steal tractors from Riesterer & Schnell.

¶5 Pursuant to a global plea agreement, Zastrow entered no contest pleas to seven felony offenses in five separate cases. The agreement provided that, in this case, Zastrow needed to plead to theft of movable property as party to a crime. Zastrow pleaded to the offense, and the remaining charges in this case were dismissed and read in. The court found him guilty and sentenced him to prison.

¶6 In January 2012, Zastrow moved to withdraw his no contest plea to theft of movable property. Relevant to this appeal, Zastrow argued he was entitled to withdraw his plea because the criminal complaint, which was used as a factual basis to support his plea, did not establish that Wisconsin had jurisdiction over the crime or that the offense was properly venued in Outagamie County. He also contended that he should be permitted to withdraw his plea because his trial counsel was ineffective for failing to challenge jurisdiction and venue. Following a hearing, the circuit court denied Zastrow's motion.

DISCUSSION

¶7 On appeal, Zastrow renews his argument that he is entitled to withdraw his plea because the criminal complaint did not establish proper jurisdiction and venue and his trial counsel was ineffective for failing to challenge jurisdiction and venue. To withdraw his plea, Zastrow carries the heavy burden of establishing by clear and convincing evidence that the withdrawal of his plea is necessary to correct a manifest injustice. *See State v. Cain*, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177. A manifest injustice occurs when the court fails to establish a sufficient factual basis for the offense to which the defendant pleads.

State v. Smith, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). A manifest injustice may also be established by a showing that the defendant received ineffective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶8 The State of Wisconsin has jurisdiction over a crime if at least one of the elements necessary to the offense occurs in Wisconsin. *State v. Anderson*, 2005 WI 54, ¶51, 280 Wis. 2d 104, 695 N.W.2d 731; *see also* WIS. STAT. § 939.03(1)(a).¹ Additionally, a crime is properly venued in a county if at least one of the elements necessary to the offense occurs in that county. *State v. Lippold*, 2008 WI App 130, ¶16, 313 Wis. 2d 699, 757 N.W.2d 825; *see also* WIS. STAT. § 971.19(1)-(2).² Therefore, for purposes of this case, if the criminal complaint established that one element necessary to the crime of theft occurred in

¹ WISCONSIN STAT. § 939.03 provides, in relevant part:

Jurisdiction of state over crime. (1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:

(a) The person commits a crime, any of the constituent elements of which takes place in this state.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² WISCONSIN STAT. § 971.19 provides, in relevant part:

Place of trial. (1) Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided.

(2) Where 2 or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occurred.

Outagamie County, Wisconsin, it follows that Wisconsin had jurisdiction over Zastrow's crime, and venue in Outagamie County was proper.

¶9 Here, the complaint alleged that Zastrow had committed theft, contrary to WIS. STAT. § 943.20(1)(a), by intentionally retaining possession of Riesterer & Schnell's movable property without consent and with intent to permanently deprive Riesterer & Schnell of its property.³ To establish that Zastrow committed theft in this manner, the State needed to prove:⁴

1. The defendant intentionally [retained possession of] movable property of another.
2. The owner of the property did not consent to the [retained possession of] the property.
3. The defendant knew that the owner did not consent.
4. The defendant intended to deprive the owner permanently of the possession of the property.

WIS JI—CRIMINAL 1441 (2009); *see also* WIS. STAT. § 943.20(1)(a).

¶10 Zastrow argues that jurisdiction and venue in Wisconsin were improper because nothing in the criminal complaint established he did anything in Wisconsin. He asserts that everything happened in Texas because that is where he was found with the stolen property.

³ WISCONSIN STAT. § 943.20(1)(a) provides that theft is committed by one who “[i]ntentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without the other’s consent and with intent to deprive the owner permanently of possession of such property.”

⁴ The pattern jury instruction outlines five different ways a defendant may commit theft under WIS. STAT. § 943.20(1)(a)—“takes and carries away,” “uses,” “transfers,” “conceals,” or “retains possession of.” The Jury Instruction Committee instructs that, when using the pattern jury instruction, one of the five ways should be selected. WIS JI—CRIMINAL 1441, n.1 (2009). The Committee also explains that, because “takes and carries away” is the most commonly charged way of committing theft, it has drafted the pattern instruction for a case where a defendant is charged with theft by taking and carrying away movable property of another. *Id.*

¶11 However, one of the elements that the State needed to prove was that Riesterer & Schnell did not consent to Zastrow's retention of its property. In support of this element, the criminal complaint stated that Riesterer & Schnell, located in Outagamie County, Wisconsin, reported to an Outagamie County sheriff's deputy that someone had taken its property without its consent. The reasonable inference is that, because Riesterer & Schnell did not consent to its property being taken, it also did not consent to its property being retained by Zastrow. Because the element of the victim's lack of consent occurred in Outagamie County, we conclude that Wisconsin had jurisdiction over Zastrow's crime and the crime was properly venued in Outagamie County. This is true even though Zastrow was discovered in Texas with the stolen property.

¶12 Our conclusion is further bolstered by our decision in *Lippold*. There, the defendant was charged in Milwaukee County with receiving stolen property. *Lippold*, 313 Wis. 2d 699, ¶2. On appeal, the defendant argued the case should be dismissed because no element of the offense showed that the crime occurred in Milwaukee County—specifically, he asserted he told police he had received the property in Kenosha County and the property was traced to Illinois and Missouri. *Id.*, ¶¶1, 3, 5. We concluded that, because the property was stolen from Milwaukee County, and because one of the elements of receiving stolen property is that the property is stolen, an element of the offense occurred in Milwaukee County and venue in that County was appropriate. *Id.*, ¶¶1, 16. Here, similarly, because at least one of the elements of theft occurred in Outagamie County, the state had jurisdiction over Zastrow's crime and the crime was properly venued in Outagamie County. As such, Zastrow is not entitled to withdraw his no contest plea on this basis.

¶13 We also reject Zastrow’s assertion that he should be permitted to withdraw his plea because his attorney was ineffective for failing to challenge jurisdiction and venue. To prove ineffective assistance of counsel, Zastrow bears the burden of proving his counsel was both deficient in his performance and that the deficiency prejudiced Zastrow. *See State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. If either showing falls short, a claim of ineffective assistance fails. *Id.*

¶14 Because we have already concluded Wisconsin had jurisdiction over Zastrow’s crime and the offense was properly venued in Outagamie County, any challenge to jurisdiction or venue made by Zastrow’s trial counsel would have been meritless. An attorney is not deficient for failing to pursue a meritless motion. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996); *see also State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (“Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.”). As a result, Zastrow has not established he is entitled to withdraw his plea based on the ineffective assistance of trial counsel.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

